any contract of employment in a mine, and I am not aware of any provision of law which this particular usage contravenes or is inconsistent with.

For these reasons, whatever my sympathies may be, this appeal must be allowed, and the judgment of the learned Deputy Controller of Labour set aside. No order as to costs.

Appeal allowed.

(ORIGINAL CIVIL JURISDICTION)

GORDON-SMITH, J.

December 17, 1938.

YAM BINTI BABA v. LOY CHIM.

Executors (Powers) and Fatal Accidents Enactment (Cap. 19) S. 4 (ii)—death of child—negligence—assessment of damages.

In an action under Section 4 (ii) of the Executors (Powers) and Fatal Accidents Enactment (Cap. 19) for damages for the death of the plaintiff's child by reason of the negligent driving of a motor lorry by a driver in the employ of the defendant the Court found for the plaintiff on the question of negligence. It was established that the child was aged 12 and that he and his brother used to sell cakes made by their mother and sisters during the mornings and that they both earned money as golf caddies in the afternoons and evenings.

Held, that the assessment of damages in such cases is entirely a matter of speculation and that in the circumstances the plaintiff was entitled to receive the potential earnings of the child for a period of 5 years on the principle that the compensation should be assessed according to the length of time during which such earnings would be coming into the household.

TRIAL OF ACTION.

C. Mills for the Plaintiff.

F. G. Charlesworth for the Defendant.

Cur. Adv. Vult.

The judgment in this case is reported on the question of assessment of damages only.

After dealing with the facts of the case and his findings on the question of negligence, his Lordship, proceeded as follows:—

Gordon-Smith, J.—I come now to the assessment of damages. The Plaintiff sues under section 4 (ii) of the Executors and Fatal Accident Enactment, Cap. 19, which provides that "every such action shall be for the benefit of the wife, husband, parent, and child (if any) of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased". A further provision is made in the event of there being no executor (as in this case) enabling any of the persons so mentioned for whose benefit such action might have been brought by an executor, to bring a similar action. The only person therefore who was entitled to bring this action was the Plaintiff, who is the sole surviving parent and it is for her benefit, and for her benefit only, that such action can be maintained. Consequently I have to assess the damages which she, and she only, has suffered by reason of the death.

Deceased was aged 12, and he and his elder brother used to sell the cakes made by their mother and sisters during the mornings, and they both earned money as golf caddies in the afternoons and evenings.

Plaintiff stated that on an average the deceased earned $30.00 per month. His brother said that between them they used to make about $70.00 per month. As a golf caddie Plaintiff stated deceased earned from $10.00 to $15.00 a month, and his brother said that he himself averaged $12.00 to $15.00 a month.

I think that both witnesses exaggerated this last amount and after full considerations and calculation as to what might be an average amount under normal conditions I fix such amount at $8.00 per month.

To try and fix the amount he earned as a cake seller is more difficult as I am unable to accept the evidence given, for the reason that I think it is also very much exaggerated. He was only a boy of 12 and I cannot accept the proposition that he was earning in the neighbourhood of $40 to $50 a month. It must be entirely a matter of speculation and I think I am not being ungenerous if I fix his earnings at $15 a month. With this and with his other earnings as a caddie it amounts to $23.00 a month. I am satisfied that he paid his earnings over to his mother, the Plaintiff.

In a somewhat similar case, *Morgan v. Scoulding*, 1938 1 K.B.D. at page 790, and under somewhat similar circumstances and where a boy of 23 was handing over to his mother 15s. a week out of his earnings, Lewis, J. awarded a sum of £300 damages in this respect under Lord Campbell's Act. This works out at a little over 7½ years earnings at this rate. Mr. Justice Lewis referred to the circumstances and said "In those circumstances one has to speculate as to how long this sum of 15s. a week would be coming into the household". It is entirely a matter of speculation and I have to speculate similarly. He might, like his brother, have acquired an ambition to become a motor driver on being ashamed to sell cakes

when he had grown up. The brother was, in fulfilment of that ambition, content to earn very much less than he had been earning as a cake seller and caddie. Deceased might have got married later, or might have died a natural death. Again, and after calculations and consideration I fix the period at 5 years. Against the total, however, one has to deduct his upkeep. His mother fixed the family expenses at $1.00 a day or 20 cents a head, exclusive of clothes. If I say 25 cents a head inclusive of everything I think that would not be far out.

The damages thus work out as follows:—

Earnings from cake selling ..	15.00	per month
Earnings as a caddie ..	8.00	„ „
	23.00	„ „
Less upkeep at 25 cents per day	7.50	„ „
	17.50	„ „
Multiplied by 12 months ..	12	„ „
	210.00	per annum
Multiplied by 5 years ..	5	
	1050.00	
I allow funeral expenses at ..	25.00	
	$1075.00	

Total damages awarded is therefore fixed at $1075.00 which I find is the amount of damages suffered by the Plaintiff and which she is entitled to recover for her own benefit.

There will be judgment for the Plaintiff in this amount, with costs.

Judgment for Plaintiff.

(ORIGINAL CIVIL JURISDICTION)

CUSSEN, J.

September 30, 1938.

MADAM CHAH SIAM

v.

CHOP CHOY KONG KONGSI.

(SELANGOR CIVIL SUIT No. 77 of 1937)

Negligence—Fish Pond—Mining operations executed on adjoining land—Collapse of bank of pond—flow of water from pond into mine—right of lateral support.

The plaintiff had been since 1934 in occupation of a large fish pond on State land at Simpah in the mukim of Ampang. The fish bought as young fry were first reared in a small pond for about 3 months and then transferred to the adjacent large pond where they remained until they attained marketable size. The large pond was in fact an old worked-out tin mine. When work ceased the mine, apparently of the shallow open cast type, filled with water by rain or surface draining. At some time or other the land became State land. The land adjoining one end of the large pond was held under mining lease by the second defendant, the mine being styled "Choy Kong Kongsi" (the first defendant). The mine was worked by defendant since 1924. Towards the end of 1936 the working face of the mine was approaching near to the boundary next to the pond. The defendant obtained a permit to prospect by boring the adjoining State land including the land on which the fish pond was situated. He bored the land some time in December/January and applied for a mining title. His application was approved but a title was not issued to him until August 1937. On the night of the 4th April 1937 at about 8 p.m. the bank of the pond gave way and the water of the pond poured into the mine bearing away the greater part of the fish in the pond. In a suit against the defendants for loss suffered by her as the result of collapse of the bank of the pond brought about by the mining operations of the defendant the plaintiff relied for her claim on (1) the defendant's negligence in the carrying out of his mining operations and (2) her absolute right to support from the land comprised in the mining lease.

Held, that inasmuch as it had not been shown that the defendant was under any legal duty of care to his adjacent occupiers, the claim so far as it was based on negligence, failed.

Held, further that the land which contained the pond being entitled to such a degree of support as it would have required in its unexcavated condition, had no right to the additional support required by reason of its weakened state resulting from the excavation.

TRIAL OF SUIT.

Cussen, J.—The relevant facts in this case I find to be as follows.

The Plaintiff had been, since 1934, in occupation of a large pond on State land at Simpah in the Mukim of Ampang, Kuala Lumpur, which she used for the purpose of rearing fish. This pond (together with another smaller one) she occupied under a Temporary Occupation Licence issued under Rule 40 of the "Land Rules 1930". (Exhibit A = 1937 Licence; Exhibit E the 1934 Licence).

I will refer later to the difficulty created by the description and specification in these licences of the actual land covered by the licence.

The fish, bought as young fry, (see Exhibits B and B1) were first reared in the small pond for about three months and then transferred to the large pond where they remained until they attained marketable size (two to four catties a fish) when they were sold to a fish-dealer, who removed them by netting from the pond and disposed of them to retail dealers in the market.